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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

PETITION FOR FURTHER CLARIFICATION

DOCKET FILE COPY ORIGINAL

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SUMMARY

Cook Inlet Region, Inc. ("CIRI") submits this Petition for Further Clarification of the Commission's Order on Reconsideration in PP Docket No. 93-253, Implementation of Section 309(j) of the Communications Act - Competitive Bidding. Specifically, CIRI urges the Commission to confirm that the affiliation rule adopted in the Order on Reconsideration that exempts from affiliation coverage entities owned and controlled by Indian tribes and Alaska Native corporations applies to both determinations of entrepreneur status and status as a small business.

As a general matter, the same grounds identified by the Commission that support the application of the affiliation exemption to entrepreneur status determinations also support the application of the exemption to determinations of small business eligibility. Indeed, the policy considerations underlying the exemption apply with equal force. Moreover, full application of the affiliation exemption is critical to create meaningful opportunities for Native Americans in PCS, and to remain consistent with established federal policy in other areas.

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PETITION FOR FURTHER CLARIFICATION

Cook Inlet Region, Inc. ("CIRI"), by its attorneys, submits this Petition for Further Clarification of the Commission's Order on Reconsideration¹ in the above-captioned proceeding. CIRI is an Alaska Native corporation organized pursuant to the Alaska Native Claims Settlement Act ("ANCSA") and an Indian tribe for all purposes before the Commission.

I. INTRODUCTION

In the Order on Reconsideration, the Commission amended Part 24 of its Rules to exempt from affiliation coverage entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations for the purposes of eligibility to apply for licenses in broadband personal communications service ("PCS") frequency blocks C and F. Specifically, the amendment adopted a Small Business Administration ("SBA") affiliation rule for Indian tribes and Native corporations designed to ensure that these "unique aggregations" are not foreclosed from government benefits for economically and socially disadvantaged groups simply because

¹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, FCC 94-217 (rel. Aug. 15, 1994) ("Order on Reconsideration").

their tribal assets are required by government mandate to be communally owned. The Commission amended its Rules to make them more consistent with other federal law, policies, and regulations regarding treatment of Indian tribes, including Alaska Native corporations.

The Commission's amendment excludes concerns owned and controlled by tribes and Native corporations from the Commission's definition of affiliate for the purposes of determining eligibility to bid in the broadband PCS entrepreneurs' blocks. The amendment also appears to exclude these entities from the affiliation rules for the purposes of determining whether an entity qualifies for additional small business preferences within the entrepreneurs' blocks. However, CIRC is concerned that this portion of the exclusion is not as clear as it should be. To avoid potential uncertainty in the auction process, CIRC urges the Commission to confirm that the affiliation exemption adopted in the Order on Reconsideration applies both to determinations of entrepreneur status and status as a small business.

As CIRC has noted before, three important principles support the Commission's action in this regard. First, there is no rational basis for applying the affiliation exemption to determinations of entrepreneur status but not to determinations of small business status. Second, the economic and social hardships historically suffered by Native people, coupled with their underrepresentation in telecommunications industries

regulated by the Commission, demonstrate that every advantage made available to a small or disadvantaged bidder must also be afforded to Native Americans to ensure that the Commission's policies furthering Native participation in PCS can be realized. Finally, the Commission's rules regarding tribal affiliation should be fully consistent with federal policy for all purposes, not just for the limited purpose of determining entrepreneur status.

II. THE REASONS FOR EXEMPTING TRIBES FROM THE AFFILIATION RULES FOR ENTREPRENEURS APPLY WITH EQUAL FORCE TO THE AFFILIATION RULES FOR SMALL BUSINESSES

As the Commission recognized in the Order on Reconsideration, Congress has mandated a tribal exemption from the affiliation rules that govern eligibility for programs administered by the SBA. The Commission acknowledged that such an exemption is proper because tribes and Native corporations represent "unique aggregations of very limited capital of historically disadvantaged people" with whom the federal government has a unique and continuing relationship and responsibility.² The Commission did not express any reason why such an exemption would not be proper as applied to the rules for determining status as a small business in addition to entrepreneur status. Indeed, there is no rational basis for considering a tribe to be "small" for the purpose of defining who

² Order on Reconsideration at ¶ 6.

qualifies as an entrepreneur, but not "small" for the purpose of defining who qualifies as a small business.

Tribes and Native corporations are social and economic aggregations mandated by the government. The characteristics of tribal ownership and the restrictions and inherent obligations on tribal assets uniquely limit both the value of those assets and the tribe's access to capital. The interests in both real and personal property held by a tribe "represent a unique form of property right in the American legal system, shaped by the federal trust over tribal land and statutory restraints against alienation."³ Indeed, even where tribal property is not directly subject to federal trusteeship, numerous constraints affect the tribe's ability to manage and dispose of its property.

For Native corporations like CIRC, those constraints are both legal and cultural. First, a number of fundamental and unique constraints arise from ANCSA itself. As noted in the SBA's rules and in the Commission's Order on Reconsideration, the stock of Native corporations is subject to strict alienability restrictions. For example, Native corporation stock cannot be sold, pledged, mortgaged, or otherwise encumbered. This means that Native corporations are precluded from two important means of access to the capital markets enjoyed by virtually every other corporation: (1) the ability to pledge stock of the company against ordinary borrowings, and (2) the ability to issue new

³ Felix S. Cohen, Handbook of Federal Indian Law 472 (repr. 1982) (1942).

stock or debt securities to raise capital. Because creditors cannot obtain access to the stock and control of the corporation, and because the corporations cannot take advantage of public market financing through securities offerings, they are precluded from raising capital that is freely available to non-tribal entities, whether those entities are large or small.

Second, one of the most important parts of tribal and Native corporation assets is their land holdings. However, these holdings are subject to legal restraints that severely limit their actual economic value and preclude their use as collateral for purposes of raising capital. Most tribal lands are owned in trust by the federal government or are subject to a restraint on alienation in the government's favor. In the case of a Native regional corporation like CIRC, 70 percent of the revenue it derives from the subsurface estate of ANCSA land must be shared among all twelve regional corporations.⁴ Thus, CIRC cannot keep the majority of the revenues it derives from its ANCSA subsurface holdings, and cannot use those revenues as a basis for raising capital.

Similarly, lands acquired by a Native corporation that lie within the boundaries of a National Wildlife Refuge are subject to laws and regulations governing use and development in the Refuge, which largely restricts the lands from free development.⁵

⁴ ANCSA, 43 U.S.C. § 1606(i) (1988).

⁵ ANCSA, 43 U.S.C. § 1621(g) (1988).

These provisions operate to constrain the free development of the lands, rendering their value for capital raising negligible.

Finally, Native lands form an important part of the cultural heritage of the tribal entities and provide a valuable base for subsistence activities of their members. These cultural values themselves operate to restrain sale, development, and access to capital.⁶

Notwithstanding these considerations, tribally-owned businesses are unique in another fundamental way. While CIRI is a business corporation, it has as its primary mission improving the social and economic lives of its Native shareholders. Thus, a far larger percentage of CIRI revenues are distributed to its shareholders than is typically the case with other corporations, regardless of their size. For example, each year CIRI typically distributes more than 50 percent of its net income in cash dividends to its shareholders (most of whom use these dividends for basic food, clothing, and shelter). These distributions limit the company's ability to invest in new businesses and raise

⁶ The cumulative effect of such restraints on the management and development of ANCSA tribal property is similar to the effect of outright statutory restraints on alienation often applied to tribal property:

As a result of these restraints [on alienation], as well as the common law theory that the execution of a mortgage in fact conveys an interest in the property, tribes are practically precluded from giving a mortgage on tribal land. Tribes frequently have had difficulty securing development capital in the private money market because they could not effectively mortgage their single largest asset: their land base.

Cohen at 520.

capital. CIRI also supports a number of social programs providing services ranging from health care and job training to cultural heritage and education projects. Other companies — large or small — simply do not perform these functions.

To help compensate for limitations on tribes' access to credit and capital, Congress has implemented a number of statutory remedies. One such remedy is the removal of restrictions on a tribe's ability to participate in federal programs providing economic development opportunities for minorities burdened in their access to credit.⁷ Where preference programs exist for disadvantaged segments of the population, and where eligibility for those programs is limited in part by the size of a business's gross revenues, Congress has found that special treatment is appropriate for entities whose access to capital is subject to serious legal and practical impediments, and who must dedicate significant revenues and efforts to improving the social and economic lives of their disadvantaged members.

In short, the reasons underlying the SBA's treatment of tribes and Native corporations as "small" do not support a distinction between "small" for defining who qualifies as an entrepreneur and "small" for defining who qualifies as a small business. Rather, the reasons for exempting tribes from the

⁷ See ANCSA, 43 U.S.C.A. § 1626(e) (West Supp. 1994) (establishing the eligibility of Native corporations for, inter alia, the SBA 8(a) Program).

affiliation rules for entrepreneurs apply with equal force to the affiliation rules for determining status as a small business.

III. APPLYING THE AFFILIATION EXCLUSION FULLY TO TRIBES IS NECESSARY TO PROVIDE FOR MEANINGFUL NATIVE AMERICAN PARTICIPATION IN THE EMERGING PCS INDUSTRY

The restrictions on tribal assets and access to capital noted above historically have provided a real barrier to Native American participation in existing businesses regulated by the Commission. Indeed, federal statistics show that despite the existence of laudable minority advantage programs such as the tax certificate program, minority participation in telecommunications industry has been negligible.⁸

Under these circumstances, there is no reason to provide greater encouragement for general small business participation in the PCS industry than is provided for Native American participation. Indeed, given the principles underlying the tribal affiliation exemption, and the historical exclusion of tribal entities from participation in industries regulated by the Commission, there is every reason to grant tribes full operation of the affiliation exclusion to the same extent other benefits are provided to small entities in the broadband auction process.

⁸ Minority Business Development Agency, U.S. Department of Commerce, A Market Analysis of the Telecommunications Industry — Opportunities for Minority Businesses 1-2 (1991). See also Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket No. 90-314, 1-5 (Sept. 15, 1993).

IV. THE COMMISSION'S RULES GOVERNING TRIBAL AFFILIATION SHOULD BE CONSISTENT WITH FEDERAL POLICY FOR ALL PURPOSES

The Commission has a mandate to regulate in the public interest,⁹ and an obligation to ensure that its policies are consistent with federal policies in areas outside of its expertise:

Administrative agencies have been required [by the courts] to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest. . . . [Such decisions] do indicate that agencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized.¹⁰

The Commission has no unique expertise in Indian matters, and until now no experience with a preference program in the nature of the SBA's 8(a) Program. Where a policy issue lies outside the Commission's area of expertise, and implicates the federal trust responsibility toward Indians, the Commission has a particular obligation to ensure that it implements established federal policy. Indeed, the federal trust responsibility applies to every federal agency, not just those charged with managing Indian matters.¹¹

⁹ Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (1970), cert. denied, 403 U.S. 923 (1971).

¹⁰ LaRose v. FCC, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974).

¹¹ Cohen at 225 ("[T]he Federal trust responsibility [toward Indians] imposes strict fiduciary standards on the conduct of executive agencies — unless Congress has expressly authorized a deviation from these standards in exercise of its 'plenary' power.").

Moreover, the extent to which the Commission's tribal affiliation rules comport with established federal policy concerning tribal affiliation rules should be considered in light of the programs to which that federal policy applies. For example, the SBA affiliation exemption mandated by Congress applies to a financial assistance program in which "small business" is defined as one with no more than \$6 million in net worth and \$2 million in net income.¹² This means that a concern owned by a tribe — regardless of the tribe's total revenues and assets — is considered by Congress and the SBA to be on the same plane as a business meeting the \$6 million/\$2 million standard. The Commission's affiliation exemption should achieve the same result.

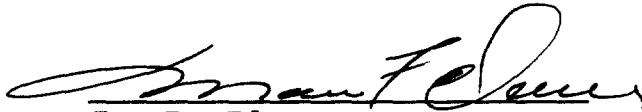
In the Order on Reconsideration, the Commission articulated the compelling grounds for providing an affiliation exemption for tribes and Alaska Native corporations for purposes of bidding in the broadband PCS entrepreneurs' blocks. The same grounds identified by the Commission support the application of that exemption to eligibility determinations for small business preferences within the entrepreneurs' blocks, and that application is consistent with federal policy toward Indian tribes.

¹² See 13 C.F.R. § 121.804(a)(2)(i) (1994). See also 15 U.S.C.A. § 636(j)(10)(J)(ii)(II) (West Supp. 1994) (directing the SBA to determine the size of a concern owned by an Indian tribe without regard to its affiliation with the tribe).

V. CONCLUSION

For these reasons, CIRI urges the Commission to clarify that the affiliation exemption adopted in the Order on Reconsideration applies both to eligibility as an entrepreneur and to qualification as a small business for the Commission's competitive opportunity plan.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Mark F. Dever", is written over a horizontal line.

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